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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

PHILIP P. STEPTOE,
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III. The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25 38

IV. This case does not involve merely the question of correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question presented here is, therefore, of importance beyond the present case 40

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ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, St. Paul Fire & Marine Insurance Company, a fire insurance company, incorporated under the laws of the State of Minnesota, respectfully represents that it is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit in the law action, entitled *St. Paul Fire & Marine Insurance Company v. Sophia C. Bachmann,* rendered on the 15th day of April, 1931 (WATKINS, *District Judge, dissenting*), a rehearing in said cause having been denied by order entered on the 29th day of June, 1931. By reason thereof, your petitioner prays for the allowance of a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

Summary of the Case.

I. This was an action at law instituted against petitioner by Sophia C. Bachmann (hereinafter referred to as "respondent") upon a fire insurance policy in the amount of $4000.00 which insured her three-story brick business building located on Main Street in the City of Wheeling, West Virginia. The insured building was damaged by fire on the evening of December 27, 1925. The suit originated in the District Court of the United States for the Northern District of West Virginia. The respondent obtained in the District Court a judgment against petitioner for the sum of $4,591.84, and the Circuit Court of Appeals, with one Judge dissenting, affirmed this judgment.

II. The important question before the Circuit Court of Appeals, which was decided adversely to your petitioner by a divided court, may be stated as follows:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a warranty providing for a forfeiture of the policy if gasoline and other dangerous articles are kept or used on the insured premises) a rider or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building for a purpose involving a far greater fire hazard, i. e., as fuel for the operation of a tenant's moonshine stills?*

III. The facts which give rise to the foregoing question in the present case are as follows:

(1) Under date of February 14, 1924, petitioner issued to respondent its policy of fire insurance for $4000.00 in the standard form prescribed for use in West Virginia by statute (Laws of West Virginia of 1923, Ch. 18). The insured building was described in the policy in the language following:

> "$4,000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*"

The policy also contained a paragraph bearing the heading "Privileges Granted", which included a provision commonly known as the "Work and Materials Clause" (for brevity it is hereinafter referred to as such) as follows:

> "* * * to do such work and to keep and use such materials as are usual in such occupancies."

The meaning of the Work and Materials Clause just quoted was explained by the following note found in the Handbook of Rules of the West Virginia Fire Underwriters Association which was filed in the office of the Insurance Commissioner of West Virginia, and hence became a part of the insurance contract (this is conceded by respondent; in fact, she introduced the Handbook of Rules in evidence in the trial court—R. p. 92):

> "Note: It is understood that the word 'materials' as used above, *includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted.*"

The policy issued to respondent also contained a warranty universally used in the standard fire insurance policy and commonly known as the "Prohibited Articles Warranty". This warranty was in the language following:

> "Unless otherwise provided by agreement in writing added hereto *this Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises;* fireworks, greek fire, phosphorus, explosives, benzine, *gasoline,* naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels."

At the time the policy was issued in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by Charles F. Bachmann, respondent's husband.

(2) In the Spring of 1925, one Huff leased the insured building and conducted therein for some months the business of manufacturing automobile oils. He used small quantities of gasoline in this manufacturing process, but as an ingredient, and not as fuel. According to Huff, the gasoline was used "as a driver in the penetrating oil to cut rust".

In April, 1925, during Huff's occupancy of the building, Carl G. Bachmann, respondent's son, and of counsel in the present case, suggested to respondent that it would be advisable to have a rider or endorsement attached to the policy since Huff was using the building for a purpose different from that specified in the policy. Thereupon, at the request of respondent, the building

was inspected by petitioner's agent, who, after having given specific directions for the safeguarding of the gasoline and other inflammable materials used by Huff in his manufacturing process, attached to respondent's policy, as a "Substituted Form", the following clause describing the occupancy of the premises:

> "$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*"

No other amendment or alteration was made in the provisions of the policy, either by addition or subtraction. Thus, the net result of the change made by the rider was merely to substitute for the words "occupied as Produce Store" the words "occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous"; and when this slight amendment is read and combined with the Work and Materials Clause quoted above, the explanatory note from the Handbook of Rules above referred to, and the Prohibited Articles Warranty, the composite result is the following:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline."
>
> "Occupied for bottling automobile oil, offices, and other mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

Giving to the rider the broadest effect possible, therefore, it is self-evident that the *absolute* prohibition

against gasoline in the Prohibited Articles Warranty was modified only in so far as gasoline might thereafter be used on the premises for three specific purposes, as follows:

1. For bottling automobile oils.
2. For offices.
3. *For other mercantile purposes not more hazardous.*

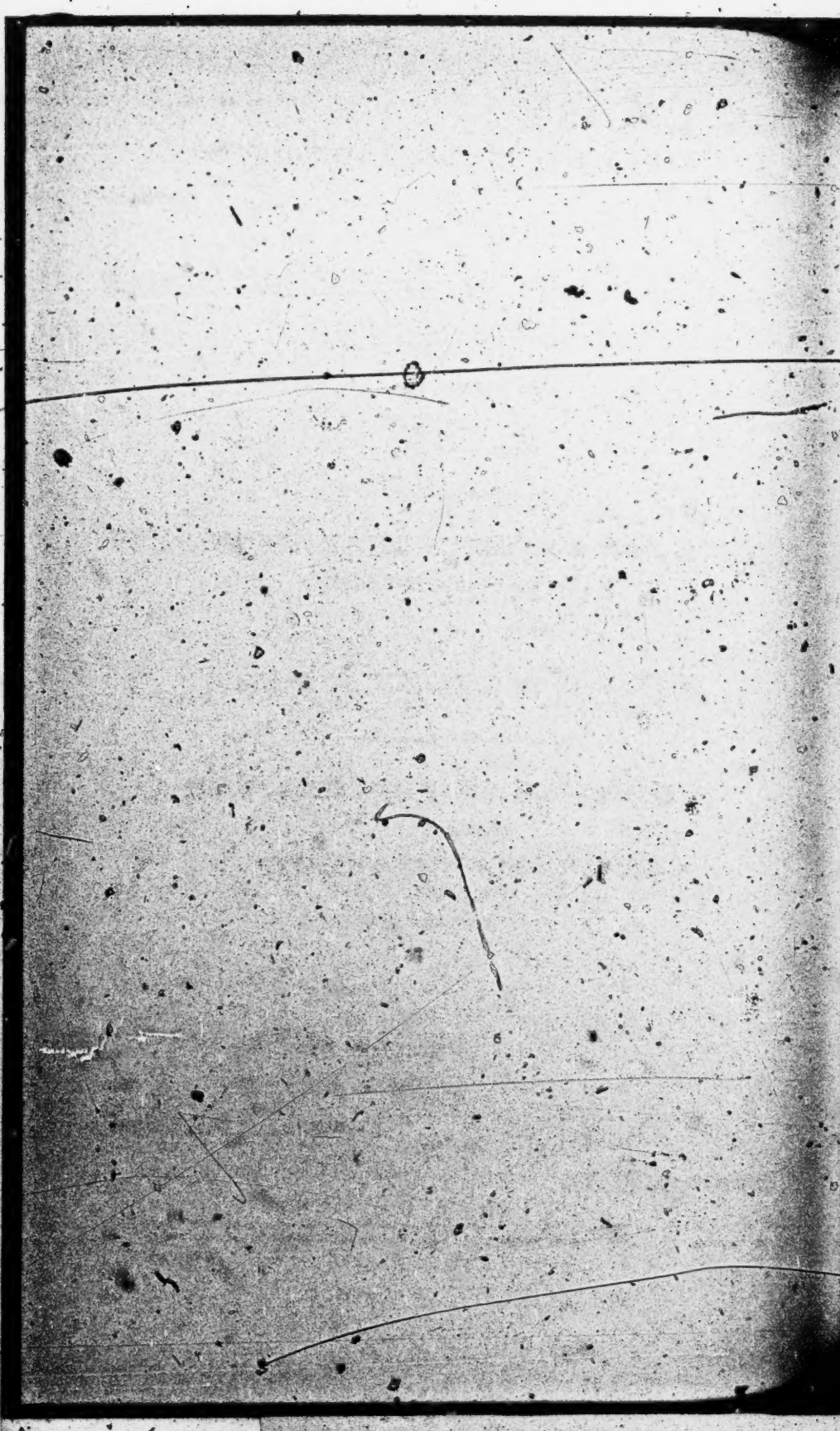
(3) It is conceded that Huff's occupancy of the Bachmann Building terminated on November 1, 1925, two months prior to the fire. On November 1, 1925, after Huff had vacated the premises, the insured building was leased for a term of eighteen months to one "Bill Varisca", an Italian, who was a complete stranger to the Bachmanns. Varisca said that he intended to use the building for a wholesale grocery business, but at the time of the fire on December 27, 1925, the building was supposedly empty and unoccupied. The only keys to the building, however, were in Varisca's possession.

(4) On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living nearby, the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero, and the water thrown upon the building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors in that vicinity, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills*, of about 150 gallons capacity each. The three stills were all designed for operation by *gasoline*, and when chopped out

of the ice after the fire, two of the compressor tanks attached to the hot plates supporting the boilers of the stills *contained large quantities of gasoline.* A number of five-gallon cans containing *gasoline* were also found in the building, as well as large quantities of moonshine mash, corn sugar, and rye grain.

(5) The officers made diligent search for the Italian tenant, Varisca, as soon as the moonshine stills were discovered. However, Varisca made good his escape and was never seen again in Wheeling.

(6) At the trial in the District Court petitioner contended that the storage and use of gasoline in the insured building by the tenant, Varisca, as fuel for the operation of his three moonshine stills, constituted a clear violation of the Prohibited Articles Warranty and forfeited respondent's policy, irrespective of whether respondent, as owner of the building, had knowledge of the tenant's act. Realizing full well that the lessor of an insured building must assume responsibility for the keeping of a prohibited article upon the premises, even though such article be kept without the knowledge or control of the lessor (see, for example: *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113; *Miller v. Union Assurance Society,* 39 Fed. (2nd) 25; *Leonard v. Northwestern Insurance Co.,* 290 Fed. 318; *Bias v. Globe & Rutgers Co.,* 85 W. Va. 134, at page 138, and *Westchester Fire Insurance Co. v. Ocean View Co.,* 106 Va. 633), respondent elected to rely upon the rider or endorsement described above which was placed upon the policy in April, 1925, respondent's contention being that this was, in effect a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. The District Court adopted respondent's theory of the case, and charged the jury accordingly, over petitioner's objections. We quote from the District Court's charge:



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I. The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110	23
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ratus, did not, when attached to a fire insurance policy containing a Prohibited Articles Warranty which expressly forbade the storage or use of gasoline on the premises, eliminate gasoline from the Prohibited Articles Warranty, or allow it to be stored and used on the premises, "except for actual use in that gas apparatus" (see 116 U. S. at 130, and 134 U. S. at 115), and that "otherwise and for all other purposes and uses it (gasoline) is expressly prohibited" (116 U. S. at 130).

It was further held by this court in the *Gunther cases* that the act of the insured's tenant in keeping gasoline on the premises for an unauthorized use was, under the Prohibited Articles Warranty, binding on the insured, irrespective of whether such act was within the control or knowledge of the insured, because "a violation of these prohibitions by anyone permitted by the assured to occupy the premises is a violation by the assured himself" (116 U. S., at 128).

II.

The decision of the Circuit Court of Appeals, in seeking to apply the rule of strict construction against petitioner where the provisions of the insurance contract in question are clear and unambiguous, is in conflict with repeated decisions of this court," including Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34.

In its opinion, the Circuit Court of Appeals referred to the well established rule that in case of ambiguity or uncertainty in its meaning, an insurance contract will be construed most favorably to the insured, and strictly against the insurance company (R. p. 187). But this rule has no application where there is no am-

biguity, and an ambiguity can not be arbitrarily created in order to apply the rule. It is submitted that the provisions of the standard Prohibited Articles Warranty in respondent's policy, and of the rider added thereto, were entirely consistent and harmonious, and gave rise to no ambiguity whatsoever.

III.

The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25.

In *Miller v. Union Assurance Society, supra,* the Circuit Court of Appeals for the Eighth Circuit held that the storage and use of gasoline by a tenant on insured premises for the purpose of operating moonshine stills constituted a breach of the Prohibited Articles Warranty in the owner's policy, even though the owner had no knowledge or control thereof, and notwithstanding the fact that the policy contained a Work and Materials Clause essentially similar to the one found in respondent's policy.

IV.

This case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question presented here is, therefore, of importance beyond the present case.

In the supporting brief, attention is called to the statutes of the various states establishing a standard form of fire insurance policy. In all essential details,

including the Prohibited Articles Warranty, the terms and provisions of the standard policy prescribed for use in the several states are identical with the language of respondent's policy. Hence, the decision of the Circuit Court of Appeals in the present case, if permitted to stand, will afford a precedent for the emasculation of the Prohibited Articles Warranty in fire insurance litigation throughout the country.

* * * * * * *

Your petitioner files herewith a certified copy of the record of all proceedings had in this cause in the Circuit Court of Appeals for the Fourth Circuit, and in the District Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be allowed and awarded by your Honorable Court to the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit, and that the said judgment be reviewed and reversed by your Honors; and that your petitioner be granted such other and further relief in the premises as to your Honorable Court may seem meet and right. And so your petitioner will ever pray.

ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Petitioner.

PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
Counsel for Petitioner,
Clarksburg, W. Va.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(Note: Index to brief included with Index to petition, *supra*).

I.

The Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in the present case was filed on April 15, 1931, and is found at pages 185 to 189 of the Record. The opinion is officially reported in 49 Fed. (2nd) 158. No additional opinion was handed down on the denial of a rehearing.

II.

Grounds for Invoking Jurisdiction of this Court.

This application for a writ of certiorari is made upon authority of Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936. As the right of this court to review by certiorari the question herein presented is clearly given by statute, no cases are cited to support such right.

III.

Statement of the Case.

The principal question presented to the Circuit Court of Appeals for the Fourth Circuit, and decided adversely to petitioner by a majority of the Court (WATKINS, *District Judge, dissenting*) was the following:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a war-*

ranty providing for a forfeiture of the policy if gasoline and other dangerous articles are kept or used on the insured premises) a rider or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building for a purpose involving a far greater fire hazard, i. e., as fuel for the operation of a tenant's moonshine stills?

The facts giving rise to this question have been briefly outlined in the foregoing petition, but will now be again summarized, with appropriate references to the Record.

In 1923, the form of fire insurance policy commonly known as the "New York Standard Policy" was prescribed for use in West Virginia by the Legislature of that State. Among the warranties in this standard policy is the "Prohibited Articles Warranty" referred to in the foregoing petition. We quote from the West Virginia statute (Laws of 1923, Ch. 18) prescribing the form and language of this warranty:

> "On and after January first, One Thousand Nine Hundred and Twenty-four, no fire insurance company, its officers or agents, shall make, issue or deliver for use any fire insurance policy, or the renewal of any such policy, on property in this State, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein * * *."

"Unless otherwise provided by agreement in writing added hereto this *Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises*: fireworks, greek fire, phosphorus, explosives, benzine, *gasoline*, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (Italics ours.)

Under date of February 14, 1924, petitioner issued to respondent its policy of fire insurance for $4000.00 in the standard form prescribed by the West Virginia statute just referred to. This policy contained the Prohibited Articles Warranty required by the statute (R. p. 7). The occupancy of the insured building was described in the policy in the language following:

"$4,000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*" (R. pp. 5, 6) (Italics ours.)

At the end of a paragraph bearing the heading "Privileges Granted", the policy contained a Work and Materials Clause in the words following:

"* * * to do such work and to keep and use such materials as are usual in such occupancies." (R. pp. 4, 6.)

A note in explanation of the meaning of the above quoted Work and Materials Clause is found in the Handbook of Rules of the West Virginia Fire Underwriters Association. The Circuit Court of Appeals concedes in

its opinion that this explanatory note became a part of the insurance contract (R. pp. 188, 189). This note was as follows:

> "Note: It is understood that the word 'materials' as used above, *includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted.*" (R. p. 92). (Italics ours.)

At the time the policy was issued to respondent in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by respondent's husband, Charles F. Bachmann.

In the Spring of 1925 one Huff leased the insured building, and occupied the same until November 1, 1925, in connection with his business of manufacturing automobile oils (R. pp. 129, 130). He used small quantities of gasoline in this manufacturing process, but as an ingredient, and not as fuel. Huff testified that the gasoline was used "as a driver in the penetrating oil, to cut rust". (R. p. 134)

In April, 1925, during Huff's occupancy of the building, Carl G. Bachmann, respondent's son, and of counsel in the present case, suggested to respondent that as Huff was using the building for a purpose different from that specified in the policy, it would be advisable to have a rider or endorsement attached to take care of the situation. In explanation of the circumstances under which the rider was added to the policy, Carl G. Bachmann testified as follows:

> "While Huff was in the Main Street building making the automobile products I went down there

one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business." (R. p. 136)

Thereupon, at the request of the Bachmanns, the building was inspected by petitioner's agent, who, after having given specific directions for the safeguarding of the gasoline and other materials used by Huff in his manufacturing process (R. pp. 107, 136), attached to respondent's policy as a "Substituted Form", a rider or endorsement describing the change in occupancy of the premises in the words following:

> "$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. p. 3) (Italics ours.)

No other amendment or alteration whatsoever was made in the provisions of the policy, either by way of addition or subtraction. Thus, the net result of the change made by the rider was merely to substitute for the words "occupied as Produce Store" the words

"occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous"; and when this slight amendment is read and combined with the Work and Materials Clause quoted above, the explanatory note from the Handbook of Rules above referred to, and the Prohibited Articles Warranty, the composite result is the following:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline."
>
> "Occupied for bottling automobile oil, offices, and other mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

It is not controverted that Huff's occupancy of the Bachmann Building terminated on November 1, 1925, two months prior to the fire (R. pp. 130, 132). On November 1, 1925, after Huff had vacated the premises, the Bachmann Building was leased for a term of eighteen months to one "Bill Varisca", an Italian who was a complete stranger to the Bachmanns (R. pp. 32-37). Varisca said that he intended to use the building for a wholesale grocery business, but at the time of the fire on December 27, 1925, the building was supposedly empty and unoccupied (R. p. 41). However, Varisca was in possession of the building and, as he had the only keys, no one else had access to it (R. pp. 37, 41).

On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living

nearby (R. pp. 50-52), the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero (R. p. 50). The water thrown upon the burning building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills,* of about 150 gallons capacity each (R. pp. 59, 60, 63, 67). The three stills were all designed for operation by *gasoline;* that is, the boilers of the stills sat upon hot plates which were fed with gasoline from three large compressor tanks attached thereto. When chopped out of the ice after the fire, two of the compressor tanks *contained large quantities of gasoline* (R. pp. 60, 65). The third compressor tank had apparently exploded (R. pp. 60, 65). A number of five-gallon cans *containing gasoline* were also found at various places in the Bachmann Building (R. pp. 60, 64, 67, 70, 74, 75, 90, 136, 137). Large quantities of moonshine mash, corn sugar, and rye grain were also found in the building by the officers.

As soon as the moonshine stills were discovered, the officers made diligent search for the Italian tenant, Varisca. However, Varisca made good his escape and was never seen again in Wheeling.

At the trial in the District Court petitioner contended that the storage and use of gasoline in the Bachmann building by the tenant Varisca, as fuel for the operation of his three moonshine stills, constituted a clear violation of the Prohibited Articles Warranty and

"You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*"

(7) Upon the appeal, the Circuit Court of Appeals for the Fourth Circuit (WATKINS, *District Judge, dissenting)* affirmed the judgment below, holding that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon the attachment of the rider. We quote from the majority opinion of the Circuit Court of Appeals:

"*At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of*

the case, and we think properly so. The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent." (R. p. 189) (Italics ours.)

(8) The judgment of the District Court was affirmed by the Circuit Court of Appeals on April 15, 1931. On May 5, 1931, petitioner filed a petition for rehearing. An order denying a rehearing was entered by the Circuit Court of Appeals on June 29, 1931. On July 3, 1931, the mandate of the Circuit Court of Appeals was stayed pending this application for certiorari.

Reasons Relied On for Allowance of Writ of Certiorari.

I.

The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

In the *Gunther cases, supra,* this court held that a permit or rider, which provided that gasoline might be used on the insured premises in a certain gas appa-

forfeited respondent's policy, irrespective of whether respondent, as the owner of the building, had knowledge of the tenant's act. The respondent realized full well the force of this argument, and therefore elected to rely upon the rider or endorsement hereinbefore described which was placed upon the policy in April, 1925, during the occupancy of the former tenant Huff, it being respondent's contention that this was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. The District Court was persuaded to adopt respondent's theory of the case and charged the jury accordingly, over petitioner's objections. We quote from the District Court's charge:

> "You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. p. 151). (Italics ours.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit the judgment of the District Court was affirmed by a divided court (WATKINS, *District Judge, dissenting*). It was held by the majority that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon

the attachment of the rider. We quote the pertinent portion of the opinion of the Circuit Court of Appeals:

> *"At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent." (R. p. 189) (Italics ours.)

IV.

Specification of Grounds Relied Upon for Allowance of Certiorari.

Petitioner urges and relies upon each of the four grounds for the allowance of a writ of certiorari which are set forth in the foregoing petition. For convenience, they are again briefly summarized:

1. *The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.*

2. *The decision of the Circuit Court of Appeals, in seeking to apply the rule of strict construction against petitioner where the provisions of the insurance contract in question are clear and unambiguous, is in conflict with repeated decisions of this court, including Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34.*

3. *The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25.*

4. *This case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question*

presented here is, therefore, of importance beyond the present case.

Argument.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, IN HOLDING THAT THE RIDER OR ENDORSEMENT ATTACHED TO RESPONDENT'S POLICY CONSTITUTED A "PERMIT" WHICH ELIMINATED GASOLINE ENTIRELY FROM THE PROHIBITED ARTICLES WARRANTY, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. GUNTHER, 116 U. S. 113, AND GUNTHER v. LIVERPOOL & LONDON & GLOBE INSURANCE CO., 134 U. S. 110.

This assignment of error was urged by petitioner in its petition for rehearing filed in the Circuit Court of Appeals (R. pp. 191 and 203-210).

In order that the conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this court in the *Gunther cases, supra,* may be properly and clearly presented, several preliminary points should be disposed of:

(a) *Effect of Prohibited Articles Warranty in respondent's policy in absence of rider.*

Leaving aside for the moment the rider or endorsement attached to respondent's policy in April, 1925, it is clear that the storage and use of gasoline in the Bachmann Building by the tenant as fuel for the operation of his moonshine stills would forfeit the policy, because in violation of the Prohibited Articles Warranty, irrespective of whether the respondent herself had any knowledge or control of the tenant's act:

Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113;

Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110;
Miller v. Union Assurance Society, 39 Fed. (2nd) 25;
Leonard v. Northwestern Insurance Co., 290 Fed. 318;
Bias v. Globe & Rutgers Fire Insurance Co., 85 W. Va. 134, at page 138;
Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633.

The Circuit Court of Appeals in the present case does not appear to question this well-settled rule of fire insurance law.

(b) *The circumstances surrounding the attachment of the rider.*

It is conceded by respondent's own witnesses that the rider upon which she relies was added to her policy during the time when the former tenant Huff was manufacturing automobile oils upon the premises, in order to make certain that such occupancy was permitted (R. pp. 107, 129, 130, 136). It is also undisputed that Huff used only a small quantity of gasoline as an ingredient in his manufacturing process (R. p. 134), and that his tenancy of the Bachmann Building terminated on November 1, 1925, two months before the fire (R. p. 130). Respondent, of course, does not contend that it was ever contemplated that the Bachmann Building should be used as a moonshine liquor plant, or that large quantities of gasoline should be stored and used therein as fuel for the operation of moonshine stills. That all these circumstances are material in determining the intention, purpose and effect of the added rider, if there be any ambiguity therein, is clear:

Reed v. Merchants Insurance Co., 95 U. S. 23.

(c) *No parol waiver or modification of Prohibited Articles Warranty.*

As respondent's policy contains the usual clause relating to the "waiver" of the printed provisions of the contract (R. p. 8), it is likewise clear, under repeated decisions of this court, that the Prohibited Articles Warranty could not be waived nor its language or effect modified, by what the petitioner's agent may have seen, or even by any verbal statements he may have made, during his inspection of respondent's building while the tenant Huff was manufacturing automobile oils therein:

Northern Assurance Co. v. Grand View Building Asso., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

(d) *The exact change in the language of respondent's policy made by the rider.*

It is self-evident that the circumstances surrounding the attachment of the rider do not support the sweeping construction which the majority of the Circuit Court of Appeals gave to it, and we come then to a consideration of the *exact language* of the rider, and the extent to which it purports on its face to emasculate or modify the Prohibited Articles Warranty, which contains an absolute prohibition against the storage and use of gasoline.

As we have pointed out before, the rider added in April, 1925, made only one slight change in respondent's policy. In place of the words "occupied as Produce Store" found in the original policy, the rider merely substituted the following words:

> "Occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous." (R. p. 3).

Hence, when the substituted language of the rider describing the occupancy of the insured building, the Work and Materials Clause, the explanatory note from the Handbook of Rules of West Virginia Fire Underwriters Association, and the Prohibited Articles Warranty are read and combined together, we get the following composite result (which, for brevity, we shall hereafter refer to as the "gasoline permit"):

> "Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring (d) while, any usage or custom to the contrary notwithstanding, there is kept, used or allowed on the described premises * * * gasoline * * *. (R. p. 7).
>
> "Occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous; gasolin eand such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

Or, stated in another way, the so-called "gasoline permit" modified the absolute prohibition of the Prohibited Articles Warranty by allowing gasoline to be stored or used on the premises for the following purposes only:

(a) For bottling automobile oils.
(b) For offices.
(c) For other mercantile purposes not more hazardous.

Having now, by this preliminary analysis, determined the exact language of the "permit" added to respondent's policy, the conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this court in the *Gunther cases* becomes readily apparent.

THE GUNTHER CASES.

The recognized leading cases upon the subject of the construction and effect of a Prohibited Articles Warranty in a fire insurance policy, and the effect of a rider or "permit" modifying such warranty, are *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, and *Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110. Both of these decisions were handed down in the same cause, which was twice appealed to this court.

The judgment recovered by Gunther upon his fire insurance policy in the first trial of the case was reversed by this court in December, 1885 (116 U. S. 113). Upon the second trial, a verdict was returned for the plaintiff, but this was set aside by the trial court (34 Fed. 501). Upon the third trial, the lower court directed a verdict in favor of the Insurance Company, and the judgment was affirmed by this court in March, 1890, upon the second appeal (134 U. S. 110).

THE FACTS IN THE GUNTHER CASES.

In order to demonstrate the applicability of these two decisions to the present case, we shall briefly state the facts as they are related in the two opinions of this court.

The policy issued to Gunther described the insured building and the occupancy thereof as follows:

> "The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be oc-

cupied by a family when not in use as a hotel)." (134 U. S. at 111).

Following the clause just quoted was the following gasoline permit:

> "Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

A Prohibited Articles Warranty in the following language was contained in the policy:

> "Petroleum * * * benzine * * * naphtha * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * * otherwise this policy shall be null and void." (134 U. S. at 111).

The insured property, a hotel building, was owned by Gunther, but at the time of the fire, which occurred in August, 1879, was being occupied by a tenant, one Walker. For a period of about eleven years, gasoline had been used in the gasometer described in the permit for the purpose of furnishing light for the hotel building, but the use of this apparatus had been discontinued in the Fall of 1878, about a year prior to the fire. Evidence was adduced at the trial tending to show that at the time of the fire gasoline was being kept by the tenant Walker in the oil room of the hotel *for some purpose other than the operation of the gasometer*. As to the particular use being made of this gasoline by the tenant, Mr. Justice Matthews said (116 U. S. 118):

"There was evidence tending to show that gasoline, benzine or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic."

Gunther had no knowledge whatsoever of the gasoline being kept by his tenant.

THE RULINGS OF LAW IN THE GUNTHER CASES.

This court, in addition to holding that it was immaterial whether the owner of the insured property knew of the tenant's violation of the Prohibited Articles Warranty (see 116 U. S. at 128-9, and 134 U. S. at 115), *held that the permit on the policy to keep gasoline on the premises for use in a certain apparatus did not allow its keeping or use for an entirely different purpose.* Upon the first appeal, Mr. Justice Matthews, speaking for this court, said at pages 130 and 131 of 116 U. S.:

"The circuit court also erred in the charge to the jury that under the circumstances disclosed by the evidence it was no breach of the conditions of the policy to have in the oil room a quantity of gasoline although not intended for use in the gas apparatus, the use of which had in fact been discontinued if the oil room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

"* * * it is clear that the privilege indorsed on the policy, in the following terms: 'To use gasoline gas—gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process', *did not sanction the keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus.* There is no express permis-

sion to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. *Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privilege granted.* * * *"

"It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and in doing so would have been justified in obtaining, keeping, storing and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. *But if the privilege itself is not actually exercised, no such implication arises and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time."* (Italics ours).

And we quote from the opinion delivered by Mr. Justice Gray on the second appeal (134 U. S., at page 115):

"The clause following the description of the buildings in each policy, 'Privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process', does not affect

the case; *for the use of the gas apparatus had been discontinued some time before the fire; and, as has already been decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus.* 116 U. S. 130 (29:581)." (Italics ours).

In order that the conflict between the decisions in the *Gunther Cases* and the opinion of the majority of the Circuit Court of Appeals in the present case may be clearly visualized and understood, we have undertaken to make below a detailed comparison thereof, in opposite columns:

COMPARISON BETWEEN FACTS AND RULINGS OF LAW IN GUNTHER AND BACHMANN CASES.

GUNTHER CASES	BACHMANN CASE
1. *Prohibited Articles Warranty*:	1. *Prohibited Articles Warranty*:
"Petroleum * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * *; otherwise this policy shall be null and void." (134 U. S. at 111).	"Unless otherwise provided in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline * * *". (R. p. 7).

2. *The Occupancy Clause:*

"The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

3. *The Gasoline Permit:*

"Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

2. *The Occupancy Clause, as Amended by Rider.*

"$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous." (R. p. 3).

3. *The Gasoline Permit*

(being the composite result of the amended Occupancy Clause embraced in the rider and the Work and Materials Clause as interpreted by the Handbook of Rules):

"Occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed conditions of the policy are permitted

when kept and used for such purposes as are usual to the occupancies permitted."

4. *Use of Gasoline when Permit Attached.*

At the time the permit was placed on the policy, gasoline was being used in the gasometer apparatus for the purpose of lighting the insured building.

4. *Use of Gasoline when Permit Attached.*

At the time of the attachment of the rider or permit, small quantities of gasoline were being used by the tenant Huff as an ingredient in the manufacture of automobile oils.

5. *Use of Gasoline at Time of Fire.*

The gasoline stored in the oil room of the insured hotel at the time of the fire was not being used in connection with the gasometer apparatus mentioned in the permit, but either in torches for lighting a pavilion or for lighting certain picnic grounds some distance away. (See 116 U. S. 118).

5. *Use of Gasoline at Time of Fire.*

The gasoline found in the Bachmann Building at the time of the fire was being used by the tenant Varisca to operate three large moonshine stills.

6. *Owner's Control or Knowledge of Gasoline.*

Gunther, the owner of the property, had no

6. *Owner's Control or Knowledge of Gasoline.*

The jury found that respondent had no knowl-

knowledge that his tenant, Walker, was keeping the gasoline on the premises.

7. *Holding of this Court.*

(a) That the permit did not eliminate gasoline from the Prohibited Articles Warranty, unless it was being used for the purpose specified in the permit. This court said, in part (116 U. S. 131):

"If the privilege itself is not actually exercised, no such implication arises; and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time." (Italics ours).

edge of the gasoline being kept on the premises by her tenant Varisca.

7. *Holding of majority of Circuit Court of Appeals.*

(a) That the rider, being construed as a "permit", eliminated gasoline altogether from the Prohibited Articles Warranty, irrespective of the use being made thereof. We quote from the majority opinion:

"It was contended on the trial below that *this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty* * * *. *The trial court took this view of the case, and we think properly so.*" (Italics ours).

(b) That Gunther was bound by the act of his tenant in keeping gasoline upon the premises, for a purpose not included within the permit, irrespective of whether Gunther had control or knowledge thereof. This court said, in part (116 U. S. 129):

"The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself." (Italics ours.)

(b) That after the rider or "permit" was attached, gasoline came under the Increase of Hazard Warranty — that is, the tenant might keep or use gasoline upon the premises for any purpose, provided respondent had no knowledge or control thereof. (R. p. 189).

We submit that this graphic comparison plainly demonstrates that the majority opinion in the *Bachmann Case* is absolutely in conflict with the principles enunciated by this court in the *Gunther Cases.*

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, IN SEEKING TO APPLY THE RULE OF STRICT CONSTRUCTION AGAINST PETITIONER WHERE THE PROVISIONS OF THE INSURANCE CONTRACT IN QUESTION ARE CLEAR AND UNAMBIGUOUS, IS IN CONFLICT WITH REPEATED DECISIONS OF THIS COURT, INCLUDING IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY, 151 U. S. 452, AND U. S. FIDELITY & GUARANTY CO. v. GUENTHER, 281 U. S. 34.

In its opinion, the Circuit Court of Appeals cites the well-established rule that where there is any ambiguity or doubt in the meaning of an insurance policy, the contract will be construed most strongly against the insurance company (R. p. 187). The propriety of the application of this rule of construction when the facts fit it is unquestioned.

In the present case, however, the rider or "permit" which the Circuit Court of Appeals undertook to construe in connection with the Prohibited Articles Warranty was, as we have heretofore demonstrated, in the following composite form:

> "Occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous; *gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted when kept and used for such purposes as are usual to the occupancies permitted.*"

Here is no inconsistency, much less any doubt or ambiguity. The right to store or use gasoline is limited to certain definite purposes. The Circuit Court of Appeals was, therefore, not justified in invoking a rule of construction which this court has frequently held

must not be applied when the language of the contract is "clear and unambiguous".

In the recent case of *U. S. Fidelity & Guaranty Co. v. Guenther,* 281 U. S. 34, at page 37, this court quoted from the leading case of *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, 462, as follows:

> "It is settled * * * that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. *But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*" (Italics ours).

We do not deem it necessary to cite the many other decisions of this court in which the same pronouncement has repeatedly been made.

It is submitted that the Circuit Court of Appeals in the present case has so obviously misapplied the rule of construction which it cites as to merit a review by this court.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS, IN SUBSTANCE AND EFFECT, IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN MILLER v. UNION ASSURANCE SOCIETY, 39 FED. (2ND) 25.

In *Miller v Union Assurance Society,* 39 Fed. (2nd) 25, the Circuit Court of Appeals for the Eighth Circuit had before it a case very similar on the facts. There, also, an Italian tenant of the policyholder was, at the time of the fire, storing and using gasoline on the insured premises for the purpose of operating his moonshine stills. The court held that the tenant's act violated the Prohibited Articles Warranty and forfeited the policy. We quote from page 29 of the opinion:

> "It was further provided that said policies should become void 'if there be kept, used or allowed' on said premises gasoline or other explosives. Undeniably large quantities of gasoline and alcohol were kept and used on said premises by Armeno. Such articles were used in connection with the unlawful manufacture of alcoholic spirits. This was a violation of the contracts and warranted the appellee in declaring them void. *La Force v. Williams City Ins. Co.,* 43 Mo. App. 519; *Liverpool & London & Globe Ins. Co. v. Gunther,* 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575; *Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857; *Leonard v. Northwestern Nat. Ins. Co.,* 53 App. D. C. 343, 290 F. 318."

It was contended in the *Miller case,* as respondent does here, that the Work and Materials Clause in the policy permitted the storage and use of gasoline on the

insured premises. The Work and Materials Clause in Miller's policy gave him the right to use the premises, "as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law" (see 39 Fed, (2nd), at page 30).

The "business conducted therein" at the time Miller's policy was written was "the manufacture of water fillers, oil burners, ice can fillers, and other small appliances" (see 39 Fed (2nd), at page 29).

Bearing in mind that the rider or "permit" was attached to respondent's policy when the Bachmann Building was being used by the former tenant Huff for the legitimate manufacture of automobile oils, the following extracts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* are peculiarly pertinent to the case at bar:

> "It is contended by the appellant that the policies themselves contain no provision relative to the use of said premises. When the policies were written, the premises were occupied by the E. L. Miller Manufacturing Company. This company was engaged in the manufacture of water fillers, oil burners, ice can fillers, and other small appliances. Both parties knew the nature and hazards of this occupancy. It was unnecessary to stipulate in the contract the nature of the occupancy and the hazards thereof when both were well known to the contracting parties." (39 Fed. (2nd), p. 29).
>
> "Neither can the storing and use of gasoline and alcohol on said premises be excused or justified under the so-called work and materials clause of the policies. This provision reserves to the occupant the right to use 'the premises as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law.'

> "Obviously and admittedly the materials in question were used in violation of law as the premises were being used not only to violate the prohibitory laws of the government but the revenue laws as well." (39 Fed. (2nd) p. 30).

While the Work and Materials Clause in respondent's policy did not contain the words "when not in violation of any law", it did embody, as we have seen, a limitation no less plain and definite, *i. e.*, that the gasoline used on the premises must be "kept and used for such purposes as are usual to the occupancies permitted" (R. p. 92). It seems obvious, therefore, that the decisions of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* and of the Circuit Court of Appeals for the Fourth Circuit in the *Bachmann case*, involving substantially the same set of facts, are in hopeless conflict.

IV.

THIS CASE DOES NOT INVOLVE MERELY A QUESTION OF THE CORRECT INTERPRETATION OF AN ISOLATED PRIVATE CONTRACT; RESPONDENT'S POLICY, AND THE PROHIBITED ARTICLES WARRANTY CONTAINED THEREIN, ARE IN THE SAME STANDARD FORM REQUIRED TO BE USED BY STATUTE IN A MAJORITY OF THE STATES, AND THE QUESTION PRESENTED HERE IS, THEREFORE, OF IMPORTANCE BEYOND THE PRESENT CASE.

In recent years, the movement toward the establishment and adoption of a standard and uniform fire insurance policy has become almost universal. It will be found that in at least twenty-five states the so-called "New York Standard Policy" has been adopted by statute and no other form of policy may be used in such states:

Arizona, Laws of 1913, Ch. 94, Sec. 56;
California, Laws of 1909, p. 404;
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075;
Idaho, Laws of 1913, Ch. 185, Sec. 13;
Iowa, Code of 1927, Secs. 9017 and 9018;
Louisiana, Laws of 1914, p. 493;
Maine, Revised Statutes, Ch. 49, Sec. 4;
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99;
Michigan, Laws of 1917, No. 256, Sec. 243;
Minnesota, Laws of 1923, Ch. 410;
Nebraska, Revised Statutes of 1913, Sec. 3237;
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1;
New Jersey, P. L. of 1902, p. 437;
New Mexico, Laws of 1925, Ch. 135, Sec. 66;
New York, Laws of 1922, Ch. 268;
North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10;
Oklahoma, Laws of 1909, pp. 348 to 350;
Oregon, Laws of 1917, Ch. 203, Sec. 22-H;
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2;
Rhode Island, P. L. 1921, Ch. 2094;
South Dakota, Laws of 1909, Ch. 164, Sec. 1 and 2;
Virginia, Laws of 1928, pp. 763-766;
Washington, Laws of 1915, p. 598, Sec. 12;
West Virginia, Laws of 1923, Ch. 18;
Wisconsin, Laws of 1923, Ch. 291, Sec. 3.

Moreover, it is common knowledge, and we believe this court can take judicial knowledge of the fact, that in practically all of the forty-eight States, the "New York Standard Policy" is used in insuring property against loss by fire, whether actually prescribed by statute or not.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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Wherever used, the "New York Standard Policy" contains a Prohibited Articles Warranty—that is, a condition providing that the policy shall be forfeited if certain dangerous articles (gasoline is almost always included in this classification) are stored or used on the insured premises, in the absence of written permission from the insurance company endorsed upon the policy. That the construction or interpretation to be given such standard Prohibited Articles Warranty is of considerable public importance when its use is so universal, and the value in the aggregate of property affected thereby is so great, can hardly be doubted; and we submit that the question which the Circuit Court of Appeals had decided adversely to petitioner in the present case—that is, whether a written "permit" from the Insurance Company to use a certain prohibited article on the premises for a definite and limited purpose thereafter eliminates such article entirely from the Prohibited Articles Warranty—is of equal importance. It is felt, therefore, that the question involved here should not be considered merely as a possible erroneous interpretation of an isolated private contract by the Circuit Court of Appeals, but as an issue of sufficient public importance to merit a review by this court.

For the foregoing reasons, your petitioner prays that a writ of certiorari be granted for the purpose of reviewing the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit herein complained of.

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